Supreme Court, U.S.
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In the Supreme Court of the United States

SHATIEK ALLAH,

Petitioner,

v.

CITY OF NEW YORK DEPARTMENT OF PARKS & RECREATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The court below did not give appropriate heed to this Court's decision in *National R.R. Passenger Corp. v. Morgan*, __ U.S. __, 122 S.Ct. 2061 (2002), which was decided during the pendency of the appeal.

2. The finding of the court below that petitioner offered insufficient evidence to allow a reasonable fact finder to conclude that respondent's proffered reasons were pretextual and its real motive discrimination, upon the motion for summary judgment, was inconsistent with decisions of this Court.

3. The finding of the court below that there was insufficient evidence for a reasonable trier of fact to conclude that retaliation for protected activity motivated actions against petitioner, upon the motion for summary judgment, was inconsistent with decisions of this Court.

LIST OF PARTIES

Petitioner

The petitioner, Shatiek Allah, has no corporate affiliations.

Respondent

The respondent is New York City Department of Parks and Recreation.

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Petitioner respectfully petitions for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Order with Bench Decision of the United States District Court for the Southern District of New York is reported at 162 F.Supp.2d 270 (SDNY 2001) and is reproduced in the Appendix. The Summary Order of the United States Court of Appeals for the Second Circuit is unreported and is reproduced in the Appendix.

JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was rendered on September 25, 2002. No rehearing was requested.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* and 42 U.S.C. §1981.

42 U.S.C. §1981 provides:

> "(a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and

property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) 'Make and enforce contracts' defined

For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

42 U.S.C. §2000e-2(a) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner is an African-American and a member of the Five Percenters religion. He became employed by respondent, New York City Department of Parks and Recreation, in or about May, 1985. At that time, petitioner was employed as a Seasonal Employee. In or about December, 1985, his status was upgraded to that of a permanent employee.

At all times during petitioner's employment, his job performance was good. At various times during his employment, petitioner had been "stepped up" to supervisory positions, including WEP Crew Chief and Seasonal Park Supervisor. One such time occurred as a result of a letter from George A. Scarpilli, Chief of Operations, dated May 26, 1995, wherein petitioner was advised that he had been accepted for a step-up position as a Parks Supervisor. During most of the times relevant hereto, except for the periods that he was stepped up, petitioner was employed as a City Park

Worker. He was assigned to District 8 in Brooklyn, New York.

Petitioner's duties and responsibilities as a City Park Worker included general maintenance, cleaning, painting over graffiti and picking up trash. For a large part of the time, petitioner was assigned to Lincoln Terrace Park in Brooklyn, New York.

During petitioner's employment as a City Park Worker, he was immediately supervised by a Park Supervisor. During times relevant hereto, he was supervised by Park Supervisors Henry Roman and James Powers. Petitioner's second line supervisor or the immediate supervisor of the Park Supervisor during his employment as a City Park Worker was the Principal Park Supervisor. During times relevant hereto, petitioner's Principal Park Supervisor was Jose Cruz. Mr. Cruz became petitioner's Principal Park Supervisor in November, 1996 and remained as such through his termination.

Petitioner's third line supervisor or the immediate supervisor of the Principal Park Supervisor was the Park & Recreation Manager. During times relevant hereto, petitioner's Park & Recreation Manager was Lena Neglia. Ms. Neglia was his Park & Recreation Manager between October, 1996 and August, 1998. She was succeeded by Arthur DeCesario. The Park & Recreations Manager reported to the Chief of Operations. During times relevant hereto, the Chief of Operations was Nancy Barthold.

All of these individuals, who undertook the complained of actions against petitioner, are non-African-American and are not of his religion. In fact,

respondent did not have any Park Supervisors who are African-American.

On or about October 30, 1996, while petitioner was acting as a Crew Chief for the Work Experience Program (WEP), he was threatened with arrest and harassed by respondent's Advocate's Office during its investigation of an individual named Jerry Martin, an employee who had been arrested for possession of a firearm.

On or about October 31, 1996, petitioner was, again, interrogated by a representative of respondent's Advocate's Office regarding the circumstances of the arrest of Jerry Martin. When petitioner, again, indicated that he had no knowledge of the circumstances regarding Mr. Martin, he was advised that a urine test, taken two (2) weeks prior to the interrogations, had yielded a positive result for cocaine. This information was given to petitioner by respondent's agents for the purpose of coercing him into changing his story regarding Jerry Martin. Petitioner did not believe that he should have properly tested positive and disputed the finding. Respondent also attempted to coerce petitioner by having Park Investigators go into trash cans, take out beer cans and bottles and try to contend that petitioner was consuming beer on the job.

During this time, in a further effort to coerce petitioner, respondent caused a false report to be filed that petitioner had been arrested for criminal possession of marijuana in the fifth degree on January 3, 1997. Petitioner then produced court documentation that he had, in fact, never been arrested for possession of marijuana.

Petitioner was offered an opportunity to resolve the discipline associated with the alleged positive test for cocaine.

He refused to settle the matter, via stipulation which would have resulted in a surrendering of any future procedural safeguards and, instead, wanted to have a full trial or hearing on the matter. Petitioner retained counsel and his counsel filed a timely appeal of the initial determination of respondent Parks Department as to the positive test results. Unfortunately, respondent did not permit petitioner to have an independent review of the disciplinary matter, by falsely arguing that petitioner's then attorney did not timely file the appeal. As a result, respondent refused to hear petitioner's appeal and petitioner was held remediless. Respondent should have proceeded to hold a hearing pursuant to statute.

As a result of respondent's denying petitioner a hearing, his pay was docked, he had vacation days taken away, he was fined a sum of money and he was given four (4) medical screenings over the course of the next year. Respondent also recommended that petitioner, for a one year period, participate in respondent's Employee Assistance Program. Despite said recommendation, petitioner was never required to participate in the Employee Assistance Program. Petitioner was also stepped-down from his position as Crew Chief. Petitioner's complaints to respondent's Director of Labor Relations were ignored. It should be noted that Dennis Mesiano, the individual who issued this determination, was the same person to whom petitioner personally handed his EEO complaint with reference to the Jerry Martin situation.

During the period of 1996-1997, two (2) non-African-American employees who were of a religion different than petitioner, Edward Pagan, a City Park Worker, and Anthony Perrone, a Maintenance Worker, also failed drug tests. Both, unlike petitioner, were stepped-up during the Summer, 1997. Petitioner, on the other hand, was

advised by Ms. Barthold, in a letter dated June 6, 1997, that he was not to be stepped-up.

Between 1988 and 1996, respondent had consistently given petitioner permits to conduct special events, including events to celebrate Black History Month and certain youth and family events. These events were held at the Von King Center, a recreation center located in Brooklyn, New York.

Beginning in or about 1996-1997, Ms. Neglia and other agents of respondent, denied petitioner permits to conduct the same events at the Von King Center. These denials were without justification and were motivated, in part, by the false disciplinary charges that petitioner had received. Petitioner was the only employee of respondent so treated.

In a letter dated December 15, 1997 to Ms. Barthold, petitioner complained of the denial of the permits and requested that Ms. Barthold investigate the matter. Ms. Barthold did nothing. Similar complaints to the Commissioner's Office also failed to resolve the situation.

In or about October, 1996 and continuing at least ten (10) times thereafter, Ms. Neglia and then Mr. DeCesario wrongfully docked petitioner's pay. Petitioner's pay was so docked, even though he had the appropriate medical documentation so as not to have his pay diminished. The reasons Ms. Neglia gave for rejecting petitioner's documentation were that they were photostated copies not containing an original signature or had missing information. At another time, another witness for respondent stated that some were submitted untimely. Petitioner denies these allegations. Respondent obviously did not want a record of petitioner's job related stress and was clearly retaliating against petitioner.

Respondent has a policy that an employee does not have to furnish a doctor's note for every absence, but only after an employee is absent for three consecutive days. Moreover, a note is not required to be submitted until the employee has returned for 5 days. Upon information and belief, no one else had his/her medical documentation refused for these reasons.

Respondent Parks Department changed and/or altered petitioner's work schedule and by changing his day off so that he could not take care of any personal business without taking a personal or vacation day. This affected petitioner because he could no longer schedule certain appointments on Mondays and this required him to take additional days off. No other employee of respondent was treated the same way with reference to the issue of days off or alteration of work schedule.

An employee, such as petitioner, received a written performance appraisal once a year. The performance appraisal was completed by the employee's immediate supervisor. It was then reviewed by the third line supervisor, who places the final signature on it.

In April, 1997, petitioner was issued such a performance appraisal for the period January, 1996 through February, 1997. Petitioner was given the overall rating of "good" by his immediate supervisor. However, upon her review, Ms. Neglia crossed out "good" and, instead, inserted "conditional." Ms. Neglia, during her deposition, could not enunciate why she changed petitioner's rating from "good" to "conditional."

Ms. Neglia changed the appraisal from "good" to "conditional" after petitioner had already signed it. She did

not speak with petitioner about the change. Ms. Neglia, before changing the evaluation, should have told petitioner about it.

As the Park & Recreation Manager, Ms. Neglia reviewed approximately 25-35 evaluations per year. Petitioner's evaluation was only one of two that Ms. Neglia could remember changing.

At the time she changed the appraisal, Ms. Neglia advised Mr. Cruz. Mr. Cruz then advised Ms. Neglia that he did not think that she should change petitioner's appraisal. Ms. Neglia was very vague as to why she wanted the appraisal changed. Mr. Cruz agreed that petitioner should have been rated as "good." Mr. Cruz had never before or after seen a situation where Ms. Neglia changed the overall rating box. In addition, Mr. Cruz could not enunciate why Ms. Neglia had changed the appraisal, although he believed it had something to do with the prior false disciplinary action. Petitioner has no knowledge of any other employee's appraisal being changed without their knowledge in the same manner.

At the time Ms. Neglia changed petitioner's performance appraisal, he was seeking to become a Seasonal Parks Supervisor, a position which he previously held on several occasions. An individual who has a "conditional" rating has a less likely chance of becoming a Seasonal Parks Supervisor than one who has a "good" rating. After this performance appraisal, petitioner was never again stepped-up to any supervisory position. Petitioner soon filed one of his many EEO complaints against Ms. Barthold. The agency, as with many of petitioner's other complaints, never properly investigated his allegations.

On May 2, 1997, Mr. Roman issued a Supervisor's Conference to petitioner. Mr. Roman indicated that he issued the document to petitioner upon the request of Ms. Barthold. Mr. Roman did not witness the incident, which was the subject matter of the Supervisor's Conference and stated that it was not right for someone else to order him to do a Supervisor's Conference for an incident for which he was not there. Mr. Roman did not remember having to do so with reference to anyone else.

As a result of the aforesaid actions, petitioner filed a number of internal Equal Employment Opportunity complaints with his employer alleging that he was the victim of discrimination based upon race, religion and retaliation. These complaints were filed against Ms. Neglia, Mr. Cruz, Mr. Powers and Ms. Barthold, among others. Some of these complaints were dated May 14, 1997, October 4, 1997, October 29, 1997, December 15, 1997, January 30, 1998, October 2, 1998, October 7, 1998, February 11, 1999, February 25, 1999, April 20, 1999, July 13, 1999 and November 23, 1999. All of petitioner's relevant supervisors had knowledge of these complaints.

These complaints were never properly investigated by respondent and its EEO Office. Petitioner also made Henry Stern, respondent's Commissioner, aware of these complaints; all to no avail.

On March 8, 1999, petitioner was given a Supervisor's Conference (Write-Up) by Parks Supervisor Jose Cruz. Mr. Cruz wrote petitioner up on orders of one Greg Dawson, neither of whom had direct knowledge of the subject matter of the write-up or were present at the time of the alleged incident. Mr. Cruz wrote the memo based on what Greg Dawson, the Chief of Operations, had told him. The write-up

did not enumerate petitioner's accusers. This write-up concerned an alleged incident that occurred involving petitioner at the Brownsville Recreation Center during what was called a "Right to Know Meeting" wherein petitioner allegedly disrupted the meeting.

At this meeting, petitioner questioned respondent's EEO policy and the length of time it took to process a complaint. He also inquired as to why respondent did not have any African-American Park Supervisors. Petitioner did not disrupt the meeting. Instead, respondent's representative was very uncomfortable and incapable of adequately answering petitioner's questions. Petitioner had been at the location in order to speak to Chief of Operations, Mr. Dawson, and his Manager, Mr. DeCesario, about his EEO complaints. It was at that time that petitioner was ordered to attend the "Right to Know Meeting."

Mr. Cruz emphasized that he was not there, but was told it was okay anyway. This was the only time that Mr. Cruz had ever issued a Supervisory Conference for something that he did not observe.

In conjunction therewith, petitioner corresponded with Nancy Barthold, Chief of Operations, and Henry J. Stern, Commissioner, for clarification of the write-up. He requested the identity of the person charging him with the alleged misconduct. After receiving no response, petitioner filed discrimination complaints against Ms. Barthold and Commissioner Stern for not identifying his accusers.

Subsequent to the filing of several complaints with respondent's EEO Office, respondent returned petitioner to the 316 Park (Elijah Stroud Playground) in or about February, 1999. Petitioner had previously been assigned to Stroud

Playground in 1997. During his previous assignment at Stroud Playground, petitioner had been the subject of a razor attack and various other threats had been made against him. Petitioner had also been arrested at that location and had lodged several complaints concerning his assignment there, including the safety of the Stroud Playground.

During the time that petitioner was assigned to Stroud Playground in 1997, he was the only City Park Worker so assigned. Ms. Neglia could not recall any other City Park Worker assigned to the Stroud Playground.

Respondent and its agents had knowledge of petitioner's problems at Stroud Playground, but, nevertheless, sought to reassign him there in February, 1999. This decision was made by Mr. Cruz and Mr. DeCesario. Mr. Cruz could not enunciate a reason why petitioner was reassigned to the Stroud Playground in February, 1999. At the time petitioner was reassigned, he was the only one selected to go.

Mr. Cruz and Mr. DeCesario transferred petitioner to the Stroud Playground in February, 1999, despite respondent's policy to place someone there only during the summer months, since there was no heat at the facility and the water was turned off for the winter. Mr. DeCesario, during his deposition, also stated that there was a heat and water problem at the facility.

Mr. Cruz could not answer why respondent deemed it necessary for petitioner to be assigned to the Stroud Playground in February, 1999, despite the fact that assignments at Stroud Playground were only made during the summer. During the winter months, the Stroud Playground was supposed to be a "mobile stop" with no one assigned there.

A meeting was held in March, 1999, between petitioner, Mr. DeCesario and Greg Dawson. During the meeting, petitioner exhibited concern about his reassignment to Stroud Playground. Mr. DeCesario admitted that he knew of these concerns at the time.

Petitioner complained about his reassignment to the Stroud Playground in February, 1999 and, as a result of these complaints, was transferred back to Lincoln Terrace Park, his previous assignment.

Mr. Roman also had knowledge of petitioner's complaints about the Stroud Playground. Mr. Roman advised Mr. Dawson that there was no heat in the building; about the previous razor attack and that he had problems with an individual in the area, but Mr. Dawson did nothing about it. Mr. Roman further stated that he objected to petitioner being assigned to the Stroud Playground in 1999 to Mr. DeCesario; to no avail.

In or about February, 1999, Mr. DeCesario also learned that petitioner had had an incident during a previous assignment at Stroud Playground and did not feel safe being there. Mr. DeCesario also stated that, had he known that petitioner felt threatened at Stroud Playground, he would not have assigned him there.

Mr. Cruz advised petitioner that the EEO Officer of respondent told petitioner's supervisor not to send him back to Stroud Playground. Mr. Cruz told petitioner that his Manager, Mr. DeCesario, disregarded this directive and sent him back there anyway.

In July, 1999, despite having knowledge of petitioner's previous problems and complaints concerning Stroud

Playground and after stating that he would not have transferred him there with such knowledge, Mr. DeCesario again decided to assign petitioner there.[1]

This occurred despite there being other employees who could have been selected for the assignment. This also occurred after petitioner had filed numerous EEO complaints against the individuals involved. The reassignment back to Stroud Playground was blatant retaliation and petitioner ultimately filed an EEO complaint against Mr. DeCesario for disregarding the said directive.

Mr. Cruz advised petitioner that he was to again be transferred to the Stroud Playground on July 13, 1999. Petitioner became annoyed at again being reassigned to the Stroud Playground and the incident which led to his being terminated occurred.

According to Mr. Cruz, petitioner uttered some curses at him because he was "very very angry at [him] for something [he guessed I] was annoyed at." Mr. Cruz said petitioner, "pushed up against [him], like belly to belly." This was the first time that petitioner had exhibited such behavior, according to Mr. Cruz.

Petitioner also advised Mr. Cruz that he knew where he lived and was going to "serve" him. By this, petitioner

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[1] During his deposition, Mr. DeCesario seemed to claim that he had little knowledge of petitioner's problems and complaints about Stroud Playground. However, there is no question that Mr. DeCesario was being deceptive. There is no question in the record that Mr. DeCesario was present at the March 2, 1999 meeting wherein petitioner expressed his concerns about Stroud Playground.

meant that he was going to see him in court. Petitioner then left the scene.

Mr. Powers witnessed this incident. He stated that petitioner was unhappy because he had just been advised that he was being transferred to another facility and heard him say that he was being singled out and picked on.

Mr. DeCesario also witnessed the incident. Other than observing petitioner place his chest up against Mr. Cruz', he did not observe petitioner coming into contact with Mr. Cruz in any other fashion. Mr. DeCesario also stated that petitioner did not threaten Mr. Powers or him. Petitioner did not threaten Mr. DeCesario or Mr. Powers. Petitioner denies striking, pushing or cursing at Mr. Cruz. He also denies threatening Mr. Cruz.

Subsequently thereto, petitioner complained to respondent's Commissioner and was eventually assigned to Mt. Prospect Park. While at Mt. Prospect Park, on or about August 17, 1999, petitioner was assigned to clean up the park by himself after an event. Although petitioner did nothing wrong and denied disobeying an order to clean the park, he was written-up by Ms. Barthold as a result.[2]

Ms. Barthold arrived at Mt. Prospect Park that day with retaliatory and discriminatory motives. There was a

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[2] Interestingly enough, Mr. DeCesario wrote or telefaxed his statement of the alleged July 13, 1999 incident to respondent on August 17, 1999. It must be more than a coincidence that Mr. DeCesario wrote his statement, at respondent's request, more than one month later and on the same day that Ms. Barthold wrote petitioner up. Other individuals allegedly involved, such as Mr. Powers, did not give a statement until September, 1999.

special event in the park the weekend prior to August 17, 1999. Petitioner was assigned to the park by himself. There were hundreds of people at the park for the special event. It took petitioner two (2) days to clean the park by himself. Respondent should have assigned, pursuant to its normal procedure, a large crew to clean the park. Upon her arrival, Ms. Barthold only inquired as to why the perimeter of the park was dirty, knowing full well that respondent's procedure was to first clean the playground of glass and debris so that children are not injured. Once that is done, the focus is then on the perimeter. Ms. Barthold never gave petitioner an order to clean the perimeter.

It is not normal for only one employee to be assigned to clean up after an event at Mt. Prospect Park. Mt. Prospect Park is a fairly large park. Prior to petitioner's being assigned there, respondent had several workers assigned there.

On or about October 1, 1999 and despite never interviewing Park Supervisor Jose Cruz, respondent and its agents charged petitioner with various acts of misconduct, most of which arose from the alleged incident between petitioner and Mr. Cruz on July 13, 1999. Petitioner was also accused of threatening Mr. DeCesario and Mr. Powers. As a result of these allegations, an informal "Step I" conference was held with respondent's agents on October 15, 1999, in which respondent's agents recommended that petitioner's employment be terminated.

A "Step II" conference was held on October 28, 1999 before respondent's Office of Labor Relations. In a Decision dated November 16, 1999, the Step II Officer also recommended that petitioner's employment be terminated. As a result, petitioner was advised by Joseph Bernstein,

respondent's Director of Labor Relations, in said decision that his employment was terminated effective December 10, 1999.

Petitioner submits that Mr. Bernstein did not mail said decision on November 16, 1999, but actually on November 23, 1999. Mr. Bernstein back-dated the decision so that it would appear to be timely in light of the fact that respondent only had ten (10) working days to issue the decision following the Step II Conference. This is the same Joseph Bernstein who claimed that petitioner's appeal of the disciplinary action back in 1997 was untimely.

On November 19, 1999, in a letter to James Hanley, Commissioner of Labor Relations for the City of New York, petitioner stated that Joseph P. Bernstein, Director of respondent's Labor Relations, did not issue his decision on the charges in a timely fashion. Petitioner had written that letter because he did not want it to be said later that Mr. Bernstein issued his decision in a timely manner, denying petitioner the opportunity to have the charges proffered against him independently reviewed. Petitioner alleges that after he had written the letter to Commissioner Hanley, Joseph Bernstein back-dated his decision and mailed it on November 23, 1999.

Mr. Bernstein indicated in his decision to terminate petitioner, that "It is the Decision of the Review Officer, after careful consideration of the facts, consultation with James Powers, Park Supervisor, Arthur DeCesario, Park Manager, Greg Dawson, Deputy Chief of Operations, and Nancy Barthold, Chief of Operations and [petitioner's] testimony in conference, that [petitioner] is guilty of all charges and

specifications." These were the same employees against whom petitioner had filed several EEO complaints.[3]

Petitioner, thereupon, sought to schedule a hearing with the New York City Office of Administrative Trials and Hearings (OATH). Despite proper requests, he was never afforded such a hearing because respondent inappropriately claimed that petitioner's union had not submitted an appropriate "waiver" of an alternate remedy, which in and of itself was never pursued. Mr. Bertstein was required by Civil Service rules to have, in his possession, a waiver of the "Step II" hearing. Thus, respondent caused petitioner to be remediless and petitioner was never afforded any independent administrative review of his dismissal, despite his repeated requests and his statutory right to such review.

Petitioner commenced this action on March 12, 1999. His attorney at the time had not filed a timely EEOC complaint. Petitioner then had to retain new counsel because of a disciplinary action imposed upon his then counsel.

It was not until petitioner retained new counsel that, on or about April 19, 2000, he filed a Charge of Discrimination/Retaliation with the Equal Employment Opportunity Commission (EEOC). This charge bore Charge No. 160-AO-1745. On August 28, 2000, the EEOC issued a "Dismissal and Notice of Rights" with reference to this charge of discrimination/retaliation.

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[3] Interestingly, some of these people, including Mr. DeCeasrio, during depositions, self-servingly stated that they had nothing to do with petitioner's dismissal.

An Amended Verified Complaint was served and filed on or about October 3, 2000.

B. Proceedings Below

Petitioner brought this action against his former employer, the New York City Department of Parks and Recreation, alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*; 42 U.S.C. §1981; the New York State Human Rights Law and the New York State Executive Law §296, *et seq.*, under the theory of race, religious and reprisal discrimination. More specifically, petitioner alleges that respondent and its agents engaged in a pattern of discriminatory and retaliatory actions against him which culminated in his dismissal on December, 10, 1999.

After discovery was completed, respondent moved for summary judgment on all of petitioner's claims. Respondent generally asserted that petitioner could not establish a *prima facie* case with reference to his claim. More specifically, with reference to petitioner's race and religious claims, respondent argued that petitioner could not establish that he suffered an adverse employment action which occurred under circumstances giving rise to an inference of discrimination. With reference to petitioner's reprisal claim, respondent argued that petitioner could not show that respondent took adverse employment actions against him and that there was a causal connection between petitioner's protected activity and the adverse employment actions. In addition, respondent argued that many of petitioner's claims were time barred.

Petitioner duly opposed respondent's motion. Petitioner argued that he had sufficiently met all elements to the establishment of a *prima facie* case under the relevant

statutes, so as to establish that genuine issues of material fact exist herein. Petitioner also asserted that all of his claims were timely.

However, in its Order dated July 31, 2001 as supplemented on the record on August 23, 2001, the District Court granted respondent's motion for summary judgment in all respects. In doing so, the District Court adopted respondent's arguments and held (1) with respect to petitioner's Title VII claim, most of the events alleged were barred by the applicable statute of limitations and the "continuing violation" exception did not apply; (2) with respect to petitioner's Title VII race and religious claims, petitioner did not show that he suffered an adverse employment action under circumstances giving rise to an inference of discrimination; (3) with respect to petitioner's reprisal claim, petitioner did not show that the employer took adverse employment action against him and that there was a causal connection between petitioner's protected activity and the adverse employment action; and (4) as a consequence, petitioner's theory under 42 U.S.C. §1981 must also fail.

In a Summary Order dated September 25, 2002, the United States Court of Appeals for the Second Circuit affirmed the Order of the District Court. In doing so, the Court of Appeals held that (1) petitioner had not established a continuing violation or hostile environment exception to the 300-day limitation period for filing discrimination claims with the EEOC; (2) assuming that petitioner had established a *prima facie* case of racial discrimination, respondent's proffered reasons for its actions were not pretextual nor was its real motivation discrimination; and (3) there was insufficient evidence for a reasonable trier of fact to conclude that retaliation for protected activity motivated respondent's

actions and that (4) petitioner's claim, pursuant to 42 U.S.C. §1981, must also resultantly fall.[4]

This Petition for Writ of Certiorari follows because several rulings in the Decision sought to be reviewed herein must be reconciled by this Court.

REASONS FOR GRANTING THE WRIT

1. The Court below Did Not Give Appropriate Heed to this Court's Decision in *National R.R. Passenger Corp. V. Morgan*, __ U.S. __, 122 S.Ct. 2061 (2002), Which Was Decided During the Pendency of the Appeal

While this appeal was pending before the Court of Appeals, this Court issued a ruling in *National R.R. Passenger Corp. v. Morgan*, __ U.S. __, 122 S.Ct. 2061 (2002). Petitioner respectfully submits that the court below did not give appropriate consideration to the affect that this holding has upon the instant case.

In *National R.R. Passenger Corp. v. Morgan, supra.*, this Court held that an employee could recover on a hostile work environment theory for acts occurring more than 300 days before a charge was filed with the EEOC. Rather than holding that this rationale applied herein, the court below determined that petitioner was time barred from introducing any incidents which occurred more than 300 days prior to his

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[4] For purposes of its discussion of petitioner's retaliation claim and because of its ruling with reference to the 300-day rule, the Court of Appeals only considered petitioner's transfer and termination.

filing a charge with the EEOC because his allegations did not state a claim for a hostile work environment. Therefore, the court below concluded that only petitioner's termination and the July, 1999 transfer were actionable under Title VII.

In so ruling, petitioner respectfully submits that the court below misapplied this Court's rationale in *National R.R. Passenger Corp. v. Morgan, supra.*, as well as other holdings by this Court. The court below concluded that actions which impact an employee's pay or benefits cannot be utilized to support a hostile environment claim. In other words, the court below seemed to conclude that adverse employment actions cannot support a hostile work environment claim. Petitioner respectfully submits that such a conclusion is too expansive and should be reviewed, clarified and reconciled in light of this Court's previous holdings.

To sustain an allegation of hostile work environment under Title VII, as well as 42 U.S.C. §1981, a claimant must prove that a reasonable person would find the work environment was "permeated with discretionary intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Harris v. Forklift Systems Inc*, 510 U.S. 17 (1993). In making this determination, all of the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employees work performance should be considered. *Harris* at 23. *Harris* was further discussed by this Court in the recent decision in *National R.R. Passenger Corp. v. Morgan.*

Petitioner submits that the court below took a too narrow view of what constitutes a hostile environment. This Court, in light of its prior decisions, should hold that conduct

which does impact an employee's pay or benefits may be part of a hostile work environment claim. This is especially true since the court below held that some of the actions alleged by petitioner did not impact his pay or benefits.[5] Had the court below so concluded it would not have limited its discussion of petitioner's Title VII claims to the most recent acts.

The harassment, as discussed in the relevant facts, was sufficiently pervasive and were acts of a nature which can support a hostile work environment claim under this Court's precedents.

This Court should grant the within Petition in order to review, clarify and reconcile the court below's decision in light of its prior holdings. The issue of what constitutes a hostile work environment, especially within the context of the 300-day rule, should be reviewed by this Court. Upon such review, this Court must reverse the court below.

2. The Finding of the Court below That Petitioner Offered Insufficient Evidence to Allow a Reasonable Fact Finder to Conclude That Respondent's Proffered Reasons Were Pretextual and its Real Motive Discrimination, upon the Motion for Summary Judgment, Was Inconsistent with Decisions of this Court

This Court set forth the standards for the order and allocation of proof in an employment discrimination case in

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[5] The District Court even took a more narrow view, holding that petitioner had failed to show any adverse employment actions.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under these standards, a plaintiff has the initial burden of establishing a *prima facie* case. If a *prima facie* case is established, then the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decision. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff then has the ultimate burden of demonstrating by a preponderance of the evidence that the defendant's proffered reason was merely a pre-textual mask for discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In its consideration, the court below assumed that petitioner established a *prima facie* case of race discrimination. However, the court, within the context of summary judgment, concluded that petitioner "has offered insufficient evidence to allow a reasonable fact finder to conclude that [respondent's] proffered reasons were pretextual and its real motive discrimination." [Pet. App. 8a]

Petitioner respectfully submits that, based upon the record herein as discussed in the relevant facts, the court below misapplied the principles established by this Court with reference to summary judgment.

This Court has enunciated the standard for summary judgment which must be applied many times. Under this standard, a motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. *See, e.g.*, Fed.R.Civ.P. 56(c); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, *see, e.g., Adickes v.*

S.H. Kress & Co., 398 U.S. 144, 157 (1970), and in assessing the record to determine whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought, *see, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The inferences to be drawn from the underlying facts revealed in materials such as affidavits, exhibits, interrogatory answers and depositions must be viewed in the light most favorable to the party opposing the motion. *See, e.g., United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

The Court's attention is directed to the relevant facts herein which petitioner respectfully submits offers sufficient evidence to allow a reasonable fact finder to conclude that respondent's proffered reasons were pretextual and its real motivation, discrimination. That discussion reveals that petitioner was singled out for the treatment that he suffered. Each and every act undertaken against him seemed to be as the result of disparate treatment and conduct which was not the ordinary course.

For example, Respondent did not act pursuant to its normal practice and procedure when it (1) retaliated against Petitioner because he refused to resolve his alleged positive test for cocaine; (2) refused to step-up Petitioner, despite stepping-up others who had also failed drug tests; (3) denied Petitioner permits to conduct special events; (4) docked Petitioner's pay, despite having appropriate medical documentation; (5) altered Petitioner's work schedule; (6) had a third line supervisor change a performance appraisal; (7) issued supervisory conferences where the supervisor did not witness the subject matter of the supervisor's conference; (8) assigned Petitioner to Stroud Playground during winter months without heat or water; (9) assigned Petitioner to

Stroud Playground, despite an EEO Officer's directive that Petitioner not be sent back there; (10) required Petitioner to clean Mt. Prospect Park after an event by himself, despite policy that more than one employee is to be so assigned; and (11) not affording Petitioner a hearing to contest his termination.

There should be no question, therefore, that, with reference to petitioner's race discrimination claim, the court below misapplied this Court's prior holdings when it (1) failed to draw all available inferences and resolve all ambiguities in favor of petitioner; (2) held petitioner to an evidentiary standard, which is more appropriate for trial, not summary judgment; (3) resolved factual issues rather than merely identifying them; and (4) failed to consider the evidence in the light most favorable to petitioner.

3. The Finding of the Court below That There Was Insufficient Evidence for a Reasonable Trier of Fact to Conclude That Retaliation for Protected Activity Motivated Actions Against Petitioner, upon the Motion for Summary Judgment, Was Inconsistent with Decisions of this Court

As the court below noted, "A plaintiff in a Title VII retaliation claim must demonstrate, for the purposes of a *prima facie* case, that: "(1) that [he] was engaged in a protected activity by opposing a practice made unlawful by Title VII; (2) that the employer was aware of that activity; (3) that [he] suffered adverse employment action; and (4) that there was a causal connection between the protected activity and the adverse action." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 79 (2d Cir. 2001); Pet. App. 9a. The court below held that "there is insufficient evidence for a reasonable trier

of fact to conclude that retaliation for protected activity motivated [petitioner's] transfer or his termination."[6]

Contrary to the holding of the court below and based upon the record, as discussed in the relevant facts herein, petitioner did sufficiently establish, for purposes of summary judgment, that respondent acted with discriminatory or retaliatory motives. Petitioner filed several EEO complaints over a lengthy period of time. Each time he complained, his complaints were met by increased retaliation. Petitioner should have had an opportunity to prove his claim at trial.[7]

This Court should grant the within Petition in order to review, clarify and reconcile the court below's decision with the standards that this Court has established with reference to summary judgment.

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[6] Because of its prior ruling, with reference to the 300-day rule, the court below only considered petitioner's retaliation claim based upon his transfer and termination.

[7] The court below also dismissed petitioner's claim under 42 U.S.C. §1981. In doing so, the court below noted that the same elements that constitute a claim of employment discrimination under 42 U.S.C. §2000e apply to a claim under 42 U.S.C. §1981. Petitioner respectfully asserts that should this Court reverse the court below with reference to his Title VII claim, then similar action should be taken with reference to plaintiff's claim under §1981.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WOLIN & WOLIN, ESQS.
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 01-9114

[Filed September 25, 2002]

SHATIEK ALLAH,
Plaintiff-Appellant,

v.

CITY OF NEW YORK DEPARTMENT OF PARKS & RECREATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York (Marrero, J.)

JUDGES:
Present: Pierre N. Leval, Guido Calabresi, Rosemary S. Pooler, Circuit Judges.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

the order of said District Court be and it hereby is **AFFIRMED**.

Plaintiff Shatiek Allah appeals from an order of the United States District Court for the Southern District of New York (Victor Marrero, District Judge) that dismissed, pursuant to Federal Rule of Civil Procedure 56, Allah's employment discrimination complaint against his former employer the New York City Department of Parks and Recreation ("Parks").

Allah, who is African-American and adheres to the Five Percenter religion, worked for Parks from May 1985 until his termination on December 10, 1999.

On March 12, 1999, Allah filed a civil rights complaint against Parks in which he made claims of racial and religious discrimination pursuant to 42 U.S.C. § 1981 and the New York Human Rights Law. The actions of which Allah complained began on October 30, 1996, when a representative of Parks threatened him with arrest while questioning him concerning the arrest of another Parks employee. Allah also complained of other incidents including (1) a 1997 disciplinary proceeding in which Allah was convicted of several charges including use of cocaine, excessive absences, and failure to promptly notify Parks of an arrest; and was disciplined by loss of pay and vacation days; (2) repeated instances in which Parks docked Allah's pay for absences; (3) a change in schedule that prevented Allah from taking care of personal business without taking a vacation or personal day; (4) denial of permits for activities Allah wished to conduct in the parks; (5) a change for the worse in Allah's

1996 performance evaluation after Allah signed it; and (6) Parks' failure to adequately investigate Allah's complaints.

On December 10, 1999, Parks fired Allah based on its findings that he struck and intimidated a supervisor, used obscene language with that supervisor, failed to obey the lawful order of another supervisor, engaged in disruptive conduct, was late on excessive occasions, and neglected assigned duties. Allah filed a complaint with the United States Equal Employment Opportunity Commission ("EEOC") on May 4, 2000. He claimed that Parks discriminated against him based on race and religion and retaliated against him for protected activities including his filing of the federal court complaint and a myriad of internal complaints. In addition to alleging that his termination was discriminatory and retaliatory, Allah complained of all the conduct set out in his federal court complaint. He also added new incidents of allegedly discriminatory and retaliatory conduct: (1) in March 1999, he was counseled in a supervisory conference despite the fact that the supervisor who counseled him had not observed the conduct at issue and (2) Parks twice assigned him to the Elijah Stroud playground despite supervisors' knowledge that the playground would be dangerous for Allah and, on one occasion, that it lacked heat and hot water.

On August 28, 2000, EEOC dismissed Allah's complaint and notified him of his right to sue. Allah then filed an amended complaint adding his new factual allegations and making a Title VII claim.

The district court granted Parks' motion for summary judgment. Judge Marrero first found that all of Allah's Title VII claims except those occurring after June 24, 1999, were

barred by the statute of limitations for filing a complaint with the EEOC. *See Allah v. City of New York Dep't of Parks & Recreation*, 162 F. Supp. 2d 270, 273 (S.D.N.Y. 2001). As to any remaining discrimination claims, the court found that Allah failed to establish both that he had suffered an adverse employment action and that the employment action in question occurred under circumstances giving rise to an inference of discrimination. *Id.* The court also dismissed Allah's Section 1981 discrimination claims because of Allah's failure to offer proof from which a reasonable jury could find an adverse employment action or could infer discrimination. *Id.* at 274. Finally, Judge Marrero dismissed the retaliation claim, finding that Allah did not offer sufficient evidence of a causal connection between his protected activity and subsequent employment actions. *Id.* at 274.

Allah appeals, arguing principally that the court erred by (1) failing to give him the benefit of the continuing violation or hostile environment exceptions to the 300 day limitation period for filing discrimination claims with the EEOC, (2) finding no adverse employment action or circumstances permitting an inference of discrimination, and (3) rejecting his retaliation claim. Parks both defends the district court's reasoning and contends that because Allah filed no complaint with the New York State Division of Human Rights ("DHR"), he had only 180 days to file his complaint with the EEOC.

For our purposes, we assume that Allah had a full 300 days in which to file his EEOC complaint. Therefore, unless Allah can establish a continuing violation or hostile environment exception to the 300-day statute of limitations, he has no Title VII claim for conduct occurring before late

June 1999, making only his termination claim and his claim that Parks discriminated against him by transferring him to a dangerous playground in July 1999 actionable under Title VII. He can establish neither.

Assuming that this circuit's test for a continuing violation exception remains valid,[1] Allah failed to make the required showing of either "discrete incidents of discrimination [that] are specifically related and are allowed to continue unremedied for so long as to amount to a discriminatory policy or practice" or of an actual discriminatory practice such as the use of a discriminatory employment test. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 907 (2d Cir. 1997) (internal quotation marks omitted). Because Allah alleges many different types of actions that were committed by different supervisors and that bear no clear relationship to each other or to the only acts within the 300-day period, he does not allege a continuing violation.

Nor do Allah's allegations describe a hostile environment. Allah complains both of acts that had a tangible effect on his employment, e.g. transfers to unattractive environments, termination, loss of pay, loss of vacation, changes in an evaluation, and of acts that on their face have

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[1] A recent Supreme Court's decision casts some doubt on the continued existence of a continuing violation exception if the continuing violation does not create a hostile environment. *See National R.R. Passenger Corp. v. Morgan*, 153 L. Ed. 2D 106, 122 S. Ct. 2061, 2072 (2002) (holding that "discrete discriminatory acts are not actionable if time barred, even where they are related to acts alleged in timely filed charges").

nothing to do with his employment, e.g. denials of permits to hold outside events. An actionable hostile environment claim, on the other hand, must target conduct like racial taunting, stereotyping, and intimidation that does not impact an employee's pay or benefits but nevertheless is so persistent and severe that it alters "the conditions of the victim's employment and creates an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). Allah does not describe a hostile environment. Consequently only his termination and July transfer claims are actionable under Title VII.

However, Allah's Section 1981 and Human Rights Law claims both have three-year statutes of limitations. *See Mian v. Donaldson, Lufkin & Jenrette Secs.*, 7 F.3d 1085, 1087 (2d Cir. 1993) (Section 1981); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 765 (Human Rights Law). Therefore, we must address the merits of all of Allah's discrimination claims.

This circuit analyzes Section 1981 and Human Rights Law discrimination claims using the same analytic framework that it uses for Title VII discrimination claims. *See Whidbee v. Garzarelli Food Specialties*, 223 F.3d 62, 69 (2d Cir. 2000) (Section 1981); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 n.4 (2d Cir. 1995). Allah must initially offer proof that, among other things, the actions taken against him "occurred in circumstances giving rise to an inference of discrimination." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Parks must then articulate non-discriminatory reasons for the actions it has taken. If Parks does so, plaintiff bears the "ultimate burden" of proving "that the legitimate reasons offered by the defendant were not its

true reasons, but were a pretext for discrimination." *Roge v. NYP Holdings, Inc.*, 257 F.3d 164, 168 (2d Cir. 2001) (quoting *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)). Plaintiff's prima facie case plus a showing of pretext may defeat a properly supported summary judgment but will not always do so. *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 103 (2d Cir. 2001). Instead, the court must determine whether plaintiff's proof could convince a reasonable fact-finder that discrimination motivated his employer. *Id.* In making this determination, the court should consider the strength of the prima facie case, the proof that defendants' explanation was false, and any other probative proof in the record.

For purposes of this discussion, we assume that plaintiff established a prima facie case of race discrimination, albeit a very weak one.[2] The only evidence plaintiff offered relevant to discriminatory intent was (1) there were no African American supervisors at Parks; (2) none of the individuals who acted against Allah were African American

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[2] We agree with the district court that certain of the acts of which Allah complained, e.g. denial of permits to use a park for outside activities, were not adverse employment actions. However, certain acts, e.g. Allah's termination, his loss of vacation and pay, and the 1997 discipline, clearly were adverse employment actions. We also assume that Allah's July 1999 transfer to a dangerous and uncomfortable playground was an adverse employment action.

Allah did not offer even a prima facie case of employment discrimination based on religion because he described no circumstances from which a reasonable fact finder could infer religious discrimination.

or Five Percenters; and (3) two other individuals whose urine tests showed narcotics use and who were neither African American nor Five Percenters were given temporary promotions for summer supervisory positions but Allah, whose urine test was positive for cocaine, was not. Allah offered no information concerning the relative qualifications of these employees, their seniority, the type of drug they took, or whether they, like Allah, were convicted of offenses in addition to the narcotics charge. In fact, the two, unlike Allah, stipulated to their guilt, an opportunity Allah also was offered but declined. Parks, on the other hand, offered significant evidence and not just plausible articulations for most of the actions it took against Allah. For instance, to justify Allah's termination, Parks offered testimony from three supervisors describing Allah's verbally and physically abusive conduct toward one of them. Allah offers almost no evidence of pretext. For instance, he does not dispute that he used obscene language with his supervisor, that the urine test underlying the 1997 disciplinary action was positive, or that he did not obey another supervisor's order to clean the perimeter of a park. We conclude that Allah has offered insufficient evidence to allow a reasonable fact finder to conclude that Parks' proferred reasons were pretextual and its real motive discrimination. Thus, we affirm the district court's dismissal of Allah's discrimination claims.

Plaintiff claimed retaliation only pursuant to Title VII. Therefore, we consider only his termination and transfer in determining whether plaintiff provided sufficient proof from which a reasonable jury could determine Parks retaliated against him. Allah can make out a prima facie case of retaliation under Title VII by showing "(1) that [he] was engaged in a protected activity by opposing a practice made

unlawful by Title VII; (2) that the employer was aware of that activity; (3) that [he] suffered adverse employment action; and (4) that there was a causal connection between the protected activity and the adverse action." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 79 (2d Cir. 2001) (internal quotation marks omitted). Assuming that Allah established that some of his many complaints were protected activity, there is insufficient evidence for a reasonable trier of fact to conclude that retaliation for protected activity motivated Allah's transfer or his termination. The record depicts an employee who was perceived by Parks as having (1) failed a urinalysis, (2) refused to stipulate to the results of that urinalysis, (3) refused to cooperate in an investigation of a fellow employee, (4) had excessive absences, (5) disrupted a meeting, (6) disobeyed a supervisor's direct order, and (7) engaged in a physical and verbal altercation with another supervisor. Therefore, the district court did not err by dismissing Allah's retaliation claims.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By:
/s/ _____
Lucille Carr

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 99 Civ. 1834 (VM)

[Dated August 23, 2001]

SHATIEK ALLAH,
Plaintiff,

v.

CITY OF NEW YORK DEPARTMENT OF PARKS & RECREATION,
Defendant.

Before: HON. VICTOR MARRERO, District Judge

APPEARANCES

WOLIN & WOLIN
Attorneys for Plaintiff
BY: ALAN WOLIN

OFFICE OF THE CORPORATION COUNSEL
FOR THE CITY OF NEW YORK
BY: ISAAC KAUFMAN
Assistant Corporation Counsel

TRANSCRIPT OF PROCEEDINGS

(Case called)

THE COURT: On July 31, 2001, the Court issued an order granting defendant's motion for summary judgment dismissing the complaint in this matter. This matter expands on and sets out the reasons for the Court's earlier decision.

In his amended complaint, plaintiff Shatiek Allah asserted several claims pursuant to 42 U.S.C. Section 1981, 42 U.S.C. Section 2000e and New York State Law. In short, Allah charges that he was subject to racial and religious discrimination, as well as retaliation up to and including the time he was terminated from his employment by the New York City Parks Department. Allah points to a finite set of discrete events to support his claims, which the Court will review for purposes of this record.

Allah claims that, (1) he was wrongfully interrogated by the park's department advocate's office conducting an investigation in October 1996; (2) the parks department wrongfully docked his pay and vacation ten times, beginning shortly after the October 1996 investigation; (3) the parks department unlawfully denied his applications for permits to conduct special events on park property around February 1996; (4) the parks department improperly changed his work schedule; (5) the parks department failed to properly investigate his complaints to the Equal Opportunity Commission, the EEOC; (6) his supervisors improperly reassigned him to different parks facilities; (7) the parks department unlawfully changed his evaluations; and (8) the parks department unlawfully terminated his employment.

Allah presents there assertions in conclusory terms. On this basis, Allah advances two causes of actions, which essentially amount to four claims: (1) that he was subject to racial and religious discrimination in violation of 42 U.S.C. Section 2000e and New York State Executive Law Sections 296 and 297; (2) that the parks department engaged in unlawful retaliation on the impermissible grounds of race, religion and exercise of his right to file a complaint before the EEOC, in violation of 42 U.S.C. Section 2000e; (3) that, as evidenced by the alleged events discussed earlier, he was subjected to discrimination in the terms and conditions of his employment on account of his race and religion in violation of 42 U.S.C. Section 1981 and Section 290 of the Executive Law of New York State; and (4) that he was discriminated against on account of his prior criminal conviction in violation of New York Human Rights Law.

The Second Circuit in *Leopold v. Baccarat, Inc.*, 174 F.3d 261, declared that Claims under the New York Human Rights Law are judged under the same standards of proof as Title 7 claims. Therefore, this Court will analyze Allah's state claims here in tandem with his federal claims.

First is the claim of racial and religious discrimination.

With respect to the first claim, the Court finds that most of the events that Allah alleges are barred by the applicable statute of limitations. Under this circuit's decision in *Tewksbury v. Ottoway Newspapers*, events that occurred prior to 300 calendar days before the filing of an EEOC complaint are time-barred. Because Allah filed the operative EEOC complaint on April 19, 2000, events that occurred

more than 300 days before that date are precluded by the statute of limitations.

In an attempt to extend the statute of limitations, Allah raises the "continuing violation" exception. However, in order to show continuing violations, a plaintiff must advance credible evidence of either a specific discriminatory practice or policy or related instances of discrimination, unremedied for so long as to amount to a discriminatory practice or policy. The Second Circuit reiterated these requirements in *Quinn v. Green Tree Credit Corp.* The Court finds that Allah's allegations and the evidence he offers to support them are inadequate to establish a continuing violation under either prong. It is insufficient to claim that one is a member of a protected class and then assert that adverse events took place because of race or religion. The record Allah constructs is void of any evidence that the events he alleges were the result of a discriminatory practice or policy. Rather, the events appear to be routine matters in the ordinary course of the parks department's business, such as investigation into employee misconduct and standard actions taken with respect to an employee's terms of employment. Therefore, the Court finds that Allah's claims of racial and religious discrimination brought under 42 U.S.C. Section 2000e pertaining to events occurring before June 24, 1999 are barred by the statute of limitations.

As for the balance of Allah's charges of racial and religious discrimination not barred by the statute of limitations, they fail because he has not adequately stated a prima facie case pursuant to 42 U.S.C. 2000e and New York State Law. In *Chambers v. TRM Copy Centers,* 43 F.3d 29, the court held that in order to make out a prima facie case

under 42 U.S.C. 2000e, the plaintiff must show, *inter alia,* that (1) he suffered an adverse employment decision and (2) the adverse employment decision occurred under circumstances giving rise to an inference of discrimination Allah has failed to establish both of these elements. The parks department has presented substantial evidence that it had race and religion neutral reasons for relocating Allah to a different park and for ultimately terminating his employment. In addition, Allah has not come forward with any credible or substantial evidence to support an inference of racial discrimination in the parks department's actions. The parks department, to the contrary, has advanced numerous legitimate grounds for its actions.

Accordingly, the parks department motion for summary judgment as to Allah's claims of racial and religious discrimination in violation of 42 U.S.C. Section 2000e and New York State law is granted and those claims are dismissed.

Next is with regard to unlawful retaliation.

Allah's second claim is that the parks department engaged in unlawful retaliation by transferring him to a different work locations and by terminating his employment because of Allah's filing of EEOC complaints, an admittedly protected activity. This claim also fails because Allah has failed to make out a prima facie case. The elements of a prima facie case are well-settled in this circuit. In accordance with *Cosgrove v. Sears Roebuck & Co.*, 9 F.3d 1033, a plaintiff mush show (1) that the employer took adverse action against the plaintiff and (2) there was a causal connection

between the plaintiff's protected activity and the adverse employment action.

With respect to Allah's transfer to a different work location, this Court concurs with recent precedent in this circuit that a mere reassignment to a new location, without more, cannot constitute a materially adverse change in the terms and conditions of Allah's employment.

Regarding his termination, Allah has failed to carry his burden on the fourth element, namely, showing a causal connection between he protected activity and the adverse employment action. To establish that causal connection, the Second Circuit's decision in *Sumner v. United States Postal Service*, held that a plaintiff must show either discriminatory treatment subsequent to the protected activity or evidence of retaliatory animus. The factual record here, however, demonstrates nothing more than legitimate termination proceedings brought on by Allah's own disruptive behavior at work. Allah has not established that the proceedings were discriminatory or animated by retaliatory motives.

On this basis, the parks department's motion for summary judgment is granted as to Allah's unlawful retaliation claim.

For the same reasons, Allah's claim of unlawful discrimination in the terms and conditions of his employment must also fail. In *Choudhury v. Polytechnic Institute of New York*, this circuit held that the same elements that constitute a claim of employment discrimination under 42 U.S.C. Section 2000e apply to claim under 42 U.S.C. Section 1981. Because Allah has not demonstrated a materially adverse employment

action and a discriminatory or retaliatory animus, he has failed to make out a prima facie case under 42 U.S.C. Section 1981.

Finally, Allah claims that he was discriminated against on account of his prior criminal record in violation of the New York City Human Rights Law. The record reflects, however, that Allah's only criminal conviction occurred 12 years after he was hired. Thus, at the time that he was hired, Allah had no criminal record. The relevant case law makes clear that New York Human Rights Law was intended to protect applicants allegedly discriminated against at the time of hiring on the basis of a prior criminal record. *See Peluso v. Smith*, 540 N.Y.S.2d 631. Allah's criminal record had no bearing on his hiring, and furthermore, Allah has failed to come forward with any meaningful evidence that his termination had anything to do with his criminal record. Thus, Allah is unable to establish discrimination pursuant to Section 296 (15) of the New York State Human Rights Law.

For the foregoing reasons, the Court will issue an order that the defendant's motion for summary judgment is granted and the complaint is dismissed and amending the Court's July 31, 2001 earlier order and closing the case.

Given the fact that this amended order will constitute the operative order for purposes of appeal, should the parties request, the Court will grant an extension of time in which an appeal may be filed.

Thank you.

MR. WOLIN: Your Honor, the judgment in this case was entered on July 31 which does mean that the plaintiff, if he wanted to appeal, would have until next week to file a notice of appeal because I believe it is 30 days from the judgment. So I do request that your Honor enter an order extending the plaintiff's time within which to file a notice of appeal, should he decide to do so, for a period commensurate with the fact that your Honor first issued this detailed decision today.

THE COURT: With this order I will direct that the period for appeal shall be 30 days from the date of this amended order.

All right. Thank you.

Mr. Kaufman, did you have anything to say?

MR. KAUFMAN: Just to say that the defendants have no objection to Mr. Wolin's request for a notice of appeal.

THE COURT: All right. Thank you.

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 99 CIVIL 1834 (VM)
DOC. # 29

[Filed July 31, 2001]

SHATIEK ALLAH,	)
Plaintiff,	)
	)
against	)
	)
THE CITY OF NY DEPT. OF	)
PARKS & RECREATION,	)
Defendant.	)
	)

JUDGMENT

Defendant having moved for summary judgment pursuant to Fed. R. Civ. P. 56, and the matter having come before the Honorable Victor Marrero, United States District Judge, and the Court, on July 31, 2001, having rendered its Order granting defendant's motion for summary judgment and closing the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated July 31,

2001, defendant's motion for summary judgment; accordingly, the case is closed.

Dated: New York, New York
July 31, 2001

JAMES M. PARKISON
Clerk of Court

By: /s/ _____
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 99 CIV 1834 (VM)

[Filed July 31, 2001]

SHATIEK ALLAH,	)
Plaintiff,	)
	)
against	)
	)
THE CITY OF NY DEPT. OF PARKS & RECREATION,	)
Defendant.	)
	)

ORDER

VICTOR MARRERO, United States District Judge.

This Court, having reviewed the papers submitted in support of and in opposition to defendant's motion for summary judgment, grants the motion. The Court finds that (1) much of the claims of discrimination plaintiff Shatiek Allah ("Allah") asserts occurred more than 300 days prior to his filing of an EEOC complaint and are thus time-barred and (2) Allah has not made a prima facie showing to support the claims set forth in his complaint. The Court's analysis will be

set forth in a detailed Decision to be forwarded to the parties under separate cover.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that the defendants' summary judgment motion is granted.

The Clerk of Court is directed to close this case.

SO ORDERED.

Dated: New York, New York
July 31, 2001

/s/ _____
Victor Marrero
U.S.D.J.